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JOHN F. DAVIS, CLE

CASE NO. 276

IN THE SUPREME COURT OF THE UNITED STATES

October Term

REED R. MAXFIELD,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

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Comes now defendant Reed Maxfield and respectfully petitions the Honorable Supreme Court of the United States for rehearing of his Petition for Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on April 22, 1966.

OPINION BELOW

The Opinion of the Court of Appeals (Pet. App. A 29-41) is reported at 360 F 2d 97.

JURISDICTION

On May 24, 1966, Mr. Justice White extended the time in which to file a petition for a writ of certiorari to and including June 21, 1966, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The petition for certiorari was denied October 10, 1966. This petition of defendant Reed Maxfield for rehearing of the petition is filed Friday, November 4, 1966.

QUESTION PRESENTED

1. Whether the defendant Reed Maxfield's constitutional due process rights of freedom from imprisonment and from deprivation of property were granted by conviction of a fraudulent scheme to sell securities to members of the public as charged in the first eight counts of the indictment under 15 U.S.C. 77 q founded on the uncorroborated, confession given by deposition—testimony of Ray Christopher and upon a simple instruction that it be considered by the jury only against the declarant?

2. Whether the erroneous view of the Tenth Circuit Court of Appeals that Western States Securities Company was merely the agent of Uinta Finance Company to sell 242,000 units of Uinta National Insurance Company rather than the purchaser of said stock to sell its own stock on its own account was prejudical to the rights of defendant Reed Maxfield on the question of a scheme to defraud?

3. Whether the time has now arrived to reexamine the rule of *Delli Paoli v. United States* 77 S.Ct. 284, 351 U.S. 245 decided January 14, 1957, by a five to four decision that confessions of one alleged co-conspirator are admissable in a trial of co-defendants if the Court merely, barely and simply instructs the jury that the confession is to be considered by them only as applying to the declarant, since there are now three new members on the Court Mr. Justice Stewart, Mr. Justice White and Mr. Justice Fortas?

4. Was it reversable error not to give an instruction on corroboration?

STATEMENT

Petitioners were charged jointly in the first eight counts with a fraudulent scheme to sell securities through a Utah corporation owned by the Christopher family namely, Western States Securities Company and in counts 9 and 10 of using the mails in furtherance of their joint fraudulent scheme, (18 U.S.C. 1341) and in count 11 of a conspiracy to perpetrate said joint, fraudulent scheme upon purchasers of Uinta National Insurance Company stock as charged in the earlier 10 counts (18 U.S.C. 371)

The jury found Reed Mexfield not guilty of using the mails to defraud as charged in counts 9 and 10 and also not guilty of any conspiracy or fraudulent concert, common purpose, agreement or scheme to sell said insurance company stock to members of the Utah public.

The only testimony that linked co-defendant Maxfield to the selling of its own National Insurance Company stock by the duly licensed brokerage corporation, Western States Securities Company and its Sales Manager Ray Christopher and its many salesmen was the deposition-confession of Ray Christopher admitted over objection of defendant Reed Maxfield.

PROMOTIONAL STOCK OF REED MAXFIELD WAS WITHIN USUAL AND REASONABLE LIMITS

Between November 1, 1958, and January 19, 1959, or about said dates Uinta National Life Insurance Company lawfully sold its stock to the public in the contract amount of $1,515,000 of which a final sale of stock of 250,000 units was sold for $250,000 (appellant's Reply Brief p. xii) less 15%, the latter figure being the allowable sales commission on all stock. There were very few cancellations prior to March, 1959.

In addition to the above public sales Reed Maxfield early purchased Uinta National stock for $125,000 which with another $10,000 also furnished by Maxfield was used to qualify Uinta National as a Legal Reserve Life Insurance Company in Utah.

When the public sale had been completed by January 19, 1959, Mr. Maxfield sold to Uinta Finance Company the Uinta National stock he originally purchased for $125,000 for the sum of $242,000. This was with full knowledge of the directors and unanimous consent of the stockholders at a specially called stockholders meeting.

At this time Uinta Finance Company had approximately 5,000 stockholders and Reed Maxfield held about 3% of the Finance Company stock. Thus Reed Maxfield secured a promoter's profit of about 9 percent above the total sales of Uinta National stock to the public. This 9% stock watering is not unusual or unreasonable for promoter's profits for advancing the original risk capital on a million and a half capital stock sale.

DISTRICT COURT OF APPEALS UPHELD THE CONVICTION AGAINST REED MAXFIELD ON THE ERRONEOUS GROUND THAT WESTERN SECURITIES COMPANY WAS AN AGENT FOR INSTEAD OF A PURCHASER FROM UINTA FINANCE OF THE STOCK WHICH THE LATTER OWNED IN UINTA NATIONAL INSURANCE COMPANY

At the close of the second paragraph of the Circuit Court of Appeals decision (360 F.2d 97) the Court says that Maxfield "and Christopher offered or caused to be offered and sold to investors through the services of Uinta Finance and Western States" the stock of Uinta National. Other erroneous statements of the Court are that Maxfield caused the Uinta National stock of Uinta Finance to be sold through (*instead of the true fact, sold to*) Western States are found in paragraphs 9, 10, 14, and 18 of said decision (Pet. for Writ of Cert. pp. 34, 35, 37 and 38.) In paragraph 9 of said decision the Circuit Court erroneously writes:

> *"It (Western States) immediately entered into a contract for the sale of Uinta National stock . . ."*

The truth is that the contract was not an agency contract for the sale of Uinta National stock for Uinta Finance Company, but a contract to buy said stock from Uinta Finance Company and to sell it for the purchaser's own account. (See: Plf's Exhibits 191 and 203, the latter showing a Utah District Court Decision that the said contract was "a conditional sales contract, title remained in Uinta Finance Company until Western States Company paid for the stock.")

Thus the entire theory of the government's case was wrongfully adopted by the Circuit Court of Appeals as an agency transaction, and the evidence conclusively shows an at-arms-length contract of conditional sale to Western States Securities Company, in which Reed Maxfield had no ownership, interest or control, except as provided in the said agreement of purchase and sale that stock would be delivered when paid for by Western Securities.

REED MAXFIELD WAS FOUND GUILTY BECAUSE OF EMBEZZLEMENTS BY RAY CHRISTOPHER, AND CHRISTOPHER'S DEPOSITION-CONFESSION WRONGFULLY IMPLICATING MAXFIELD

The crux of this case is that Ray Christopher secured for Western Securities $182,000 by purported sales of Uinta National Insurance Company stock. (Tr. 56-58, 77-80). Of the $182,000 defendant Ray Christopher, by his own admission, misappropriated $88,000 in cash (R.1409). He could not deliver stock for this amount because Western States did not pay to Uinta Finance those

funds secured from sales which was a condition precedent to securing Uinta National stock from escrow to deliver to purchasers. Certainly Reed Maxfield should not be held liable for losses to customers caused by peculation of Ray Christopher. Yet it was the confessions and the believed-to-be self-serving declarations of peculator Ray Christopher which was admitted as the damaging evidence on which the jury found Reed Maxfield guilty.

A NON-EMBEZZLING CO-DEFENDANT SHOULD NOT STAND CONVICTED ON THE QUESTIONABLE AND REPUDIATED TESTIMONY IN A DEPOSITION BY A CONFESSING EMBEZZLOR UNLESS SUCH TESTIMONY IS CORROBORATED BY OTHER TESTIMONY BEYOND A REASONABLE DOUBT

The evidence in this case shows beyond a reasonable doubt that the very substantial loss to stockholders and the downfall of the two Maxfield companies was percipitated by the embezzlement by Ray Christopher of about $88,000.00 from Christopher's own company, Western States Securities. The loss to stockholders did not result from the 9% stockwatering by promoter Reed Maxfield several months prior to the Christopher embezzlements.

In criminal cases wherein a confessing felon repudiates under oath the part of his confession implicating an alleged accomplice, a new separate trial should be given to the implicated do-defendant as necessary for his constitutional guaranty of a fair trial. In this case the confessing co-defendant Ray Christopher signed an affidavit

one month and eight days after the taking of his deposition (R. 1180-1181) repudiating and giving the lie to, his deposition confession wherein it implicated Reed Maxfield as having any part in Western States Securities Company operations (Exhibit 130).

INSTRUCTION GIVEN WAS INADEQUATE TO PROTECT RIGHTS OF THE ACCUSED CO-DEFENDANT MAXFIELD TO A FAIR TRIAL

The trial court instructed the jury that the incriminating statements against Maxfield in the Christopher deposition admitted in evidence and read to the jury were not to be considered by the jury as evidence against Maxfield. The futility and evident injustice of this limited type of instruction is boldly illustrated by the fact that the government in its statement of the case given in its brief before the Circuit Court of Appeals cities supposed facts of incrimination from the deposition of Ray Christopher no less than 16 times. (See said Govt's brief, p.4, 2 citations; p.5, 1 cit.; p. 6, 4 cits.; p.8, 3 cits.; p.9, 4 cits.; and p. 11, 2 cits.)

Certainly in cases like this one wherein the confessing co-defendant repudiates under oath the implicating statements in his deposition confession on which the government relies so heavily, a stronger instruction to the jury or exclusion of the deposition confession from the joint trial is called for in the interest of a fair trial.

The trial Court should at least add to its abbreviated instruction as given, an instruction to consider the deposi-

tion only as against the declarant, a further safeguarding instruction to the effect that unless the damaging statements of the confessing co-defendant are found to be corroborated beyond a reasonable doubt by testimony other than that of the confessing co-defendant that the jurors must find the implicated co-defendant not guilty, Smith v. United States 348 U.S. 147. Perhaps the better rule is one of exclusion as argued by the four dissenting judges in the *Delli Paoli* case *infra*.

THE TIME HAS COME FOR REEXAMINATION OF THE DELLI PAOLI CASE

The questions of admission of a co-defendants implicating confession in a joint trial or of providing adequate safe-guarding instructions in such cases are questions of balancing the delicate but vital considerations of fair trial against those of needed protection of society against criminals who act in concert.

Since the 5 to 4 decision in the *Delli Paoli* case *infra* three new Justices have been appointed to the Supreme Court of the United States who still remain as Justices - Mr. Justice Stewart, Mr. Justice White and Mr. Justice Fortas. Also three more states in addition to California have established the rule of exclusion argued for by the dissenting Justices in the *Delli Paoli* case. The new state cases having established the rule of inadmissibility of the implicating or incriminating deposition confession in a trial of joint defendants are: *State of New Mexico v. Tapia* New Mex., 411 P 2d 234 (1966); *State of Arizona v.; Goodyear* Ariz., 413 P 2d 566 (1960); and *State of New; Jersey v. Young*, New Jersey, 215 Atl. 2d 352 (1965).

We quote from Appellants' Reply brief page 10, filed in the Circuit Court of Appeals to emphasize the great temptation on the confessing defendant to gain a benefit by blaming the co-defendant.

The record is quite clear, as appellant Christopher contends, that his deposition taken by Commission attorney Weggeland on September 27, 1960, was induced by hope or promise of reward or benefits from so testifying. Christopher, was told that the Commission was not after him and that he was "a small fish" and in fact, the Commission was after Maxfield (R. 1173, 1166). The language of the deposition of Christopher found at page 1290 of the record clearly supports Christopher's view. It is amply clear that Christopher was happy to be led along on this expedition, for after all, the SEC wasn't after him and the more information he gave involving Maxfield, helped him out of his snare. After off the record conferences, Christopher was extremely lucid for a man suffering from an old head injury with a poor memory (R. 1294).

We further quote from Appellants' brief pages 18 to 20 filed in this Court as follows:

As Justices Frankfurter, Black Douglas and Brennan pointed out in their dissent in *Delli Paoli v. United States*, 77 S.Ct. 284, 351 U.S. 245 (1957):

> *"Prosecutions for conspiracy present difficulties and temptations familiar to anyone with experience as a federal prosecutor. The difficulties derive from observance of the rules governing evidence admissible*

against some but not all defendants in a criminal case. The temptations derive from the advantages of prosecuting in one trial two or or more persons collaborating in a criminal enterprise. One of the most recurring of the difficulties perttains to incriminating declarations by one or more of the defendants that are not admissible against others. The dilemma against the declarants but cautioning the jury against its use in determining the guilt of the others. The fact of the matter is that too often such admonition against misuse is intrisically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. While enforcing the rule of admitting the declaration solely against a declarant and admonishing the jury not to consider it against other defendants, Judge Learned Hand, in a series of cases, has recognized the psychological feat that this solution of the dilemma demands of juries. He thus stated the problem:

'in effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's.' Nash v. United States, 2 Cir., 54 F. 2d 1006, 1007.

It may well be that where such a declaration only glancingly, as it were, affects a codefendant who cannot be charged with the admitted declaration, the rule enforced by the Court in this case does too little harm not to leave its application to the discretion of the trial judge. But where the conspirator's state-

ment is so damning to another against whom it is inadmissible, as is true in this case, the difficulty of introducing it against the declarant without inevitable harm to a coconspirator, the petitioner in this case, is no justification for causing such harm. The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds. After all, the prosecution could use the confession against the confessor and at the same time avoid such weighty unfairness against a defendant who cannot be charged with the declaration by not trying all the co-conspirators in a single trial.

CONCLUSION

In conclusion Petitioner Reed Maxfield prays for granting of his petition for rehearing of his Petition for Certiorari to gain a new trial for the reasons:

1. That there is no corroborating evidence that Reed Maxfield had any control, interest, ownership, direction or management whatever of Ray Christopher's brokerage Company - Western State Securities Company.

2. That the defendant was denied a fair trial, because the instruction to the jury merely to disregard the implications of guilt against Maxfield found in Christopher's deposition confession in a joint trial charging a scheme to defraud under the circumstances showing repudiation of that deposition-testimony under oath by Christopher later, was entirely inadequate to cause the jury to erase

from their mind the damaging implication statements of Christopher read to them from his deposition in a joint criminal trial.

3. The entire opinion of the Circuit Court of Appeals, *supra* was decided on the false assumption that Western States Securities Company was selling the stock of Uinta National Insurance Company owned by Uinta Finance Company as an agent of Uinta Finance Company while the undisputed evidence shows that Western States Securities Company was selling its own stock secured by delivery of purchase money to Uinta Finance Company secured from the purchasing public to secure release amounts of said stock held in escrow under a conditional sales agreement as determined by a District Court of the State of Utah.

4. That because of three new Justices now being on the Supreme Court of the United States who may not now go along with the bare majority view in the *Delli Poali* case and because the States are adopting the dissenting view of exclusion of the incriminating deposition-confession of an admitted felon, the time has come for a reexamination of the questions decided in the *Delli Poali* case.

5. It was reversable error not to give an instruction on corroboration.

Dated this 3rd day of November 1966.

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